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COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

AT RICHMOND, MARCH 11, 2003

APPLICATION OF

DUKE ENERGY WYTHE, LLC

CASE NO. PUE-2001-00721

For permission to construct  
and operate an electrical  
generating facility

**ORDER REMANDING  
FOR FURTHER PROCEEDINGS**

On January 27, 2003, Hearing Examiner Michael D. Thomas issued his report in this case ("Report"). The Report finds, among other things, that there is insufficient evidence in the record on certain issues. Report at 76-77. The Examiner recommends that the State Corporation Commission ("Commission") enter an order: (1) adopting the findings in the Report; (2) denying the application herein; or in the alternative (3) remanding the case for further proceedings consistent with the findings in the Report. Report at 77. Pursuant to Rule 5 VAC 5-20-120 C of the Commission's Rules of Practice and Procedure, responses supporting or objecting to the Report must be filed within 21 days of the issuance of the Report. See also Report at 77.

On February 4, 2003, Duke Energy Wythe, LLC ("Company") filed a Motion for Remand of Proceedings to Hearing Examiner ("Motion"). The Company asks that the Commission "enter an Order providing for: (1) Remand of this proceeding directing the Hearing Examiner to convene a conference of the parties for the purpose of more specifically identifying issues with respect to which he believes the current record to be insufficient and to establish a procedural schedule for the presentation of evidence; and (2) Extension of the time for filing Comments on

the January 27, 2003 Report of the Hearing Examiner until 21 days after filing by the Hearing Examiner of a supplemental Report at the conclusion of the procedure on remand." Motion at 3. On February 5, 2003, the Commission issued an order suspending the date for filing responses to the Report, pending the Commission's ruling on the Motion.

On February 11, 2003, the Commission's Staff ("Staff") filed a response to the Motion, wherein Staff requests the Commission to deny the Motion and to allow comments on the Report to be filed prior to any remand order ("Response"). Staff states that "[i]n the event the Commission decides to remand this proceeding rather than to deny the application, Staff believes that persons participating in the proceeding should have the opportunity to file comments to the [Report] prior to any Commission order directing remand." Response at 2. Staff asserts that to do otherwise may deprive the Commission of critical information necessary to determine the scope of such proceeding. In addition, on February 28, 2003, Staff filed a motion requesting that the Commission accept a February 14, 2003, letter from the Department of Conservation and Recreation as a late-filed exhibit or, in the alternative, to reopen the record.

NOW THE COMMISSION, upon consideration of this matter, remands this case to the Hearing Examiner for further proceedings. The Hearing Examiner shall establish appropriate procedures for this case on remand, including a determination of issues to be addressed on remand and a schedule and procedures to address those issues.<sup>1</sup> In addition, a copy of any ruling

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<sup>1</sup> The Hearing Examiner's Report identifies, in a number of places, issues for further evaluation. The Report also notes that pursuant to § 56-580 D of the Code of Virginia ("Code"), the Commission shall impose no additional conditions with respect to matters that: (1) are governed by a permit or approval issued by a governmental entity; or (2) are within the authority of, and were considered by, the governmental entity in issuing such permit or approval. Thus, perhaps not each issue discussed in the Report is within our jurisdiction to review. The Commission is, however, obligated under § 56-580 D of the Code to give consideration to, among other things, the public interest and identified environmental matters that are not excluded from our review by §§ 56-580 D and 56-46.1. Accordingly, the Examiner's report on remand shall identify issues we are to consider under the statutory scheme and include his findings and recommendations with respect to those issues.

by the Examiner establishing an evidentiary hearing shall be mailed to each person that previously testified in this case as a public witness. Public witnesses, however, shall not be placed on the service list for this case.

The Hearing Examiner found that the record in this proceeding is inadequate to recommend approval of the application. The Company has the obligation to produce sufficient evidence to support its application, including evidence related to the issues the Examiner determines must be addressed pursuant to §§ 56-580 D and 56-46.1 of the Code. We also expect Staff to undertake, with existing personnel or with acquired expertise, a knowledgeable review, investigation, and analysis of the application and the issues attendant thereto. Along with the Company and Staff, we are hopeful that the Department of Environmental Quality and other governmental agencies will assist in developing a record upon which the Hearing Examiner will prepare complete findings and recommendations to the Commission.

We also assign to the Hearing Examiner, to rule upon as part of the proceeding on remand, Staff's February 28, 2003, Motion to Accept Late Filed Exhibit, or in the Alternative, to Reopen the Record. Finally, responses to the Hearing Examiner's Report of January 27, 2003, shall be due on the same date as responses to the Examiner's subsequent report on remand.

Accordingly, IT IS HEREBY ORDERED THAT:

(1) This case is remanded to the Hearing Examiner for further proceedings as discussed herein.

(2) Staff's February 28, 2003, Motion to Accept Late Filed Exhibit, or in the Alternative, to Reopen the Record, is assigned to the Hearing Examiner to rule upon as part of the proceeding on remand.

(3) Responses to the Report of Michael D. Thomas, Hearing Examiner, dated January 27, 2003, shall be filed on or before the due date for responses to the Hearing Examiner's subsequent report on remand.

(4) This matter is continued pending further order of the Commission.